No. 2711

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MILLER & LUX INCORPORATED
(a corporation),
Plaintiff in Error,

vs.

SAVERIO DI GIOVANNI PETROCELLI, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, deceased,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

EDWARD F. TREADWELL,
Attorney for Plaintiff in Error.

PERNAU PUBLISHING COMPANY

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Statement of the Case.

This action was originally brought in the Superior Court of the State of California, in and for Merced County, by G. E. Nordgren, as administrator of the estate of Peter Spino, in behalf of his heirs alleged to be Jovetta Spino and Sunda Spino, to recover damages for the death of Peter Spino, alleged to have been caused on the first day of July, 1912, by the running away of a harvester team driven by him (Rec. p. 6).

The defendant caused the case to be removed into the United States District Court on a petition alleging that

the defendant was a citizen of Nevada and the said heirs to Spino were subjects of the Kingdom of Italy. A demurrer to the original complaint was sustained (Rec. p. 16). Later the court substituted as plaintiff Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, sometimes known as Peter Spino, and he filed an amended complaint on behalf of Giuditta di Giovanni Petrocelli Spina and Assunta Spina (Rec. p. 17). The amended complaint does not allege the citizenship of either the plaintiff or the heirs on whose behalf the suit was brought. The amended complaint alleged in substance that the decedent was engaged as a driver on a harvester team composed of thirty-two mules; that a sack-counter named Twining approached the mule team with a horse, which frightened the mule team and caused it to run, causing the decedent to fall, resulting in his death. The admitted fact is that he drove in a horse and cart alongside of the harvester, and that the horse attached to the cart ran away and scared the mule team, which likewise ran away, and the decedent fell and was killed.

Three claims of negligence are alleged in the complaint: First, that the horse supplied Twining was in fact a vicious horse, and known by the defendant to be vicious; second, in failing and neglecting to provide the decedent with a safe place to work; and, third, that Twining approached the team without any effort to manage, restrain, control or quiet his horse, or to take any precaution or care in driving it to avoid the frightening of the harvester team. The answer (Rec. p. 25) denied these allegations, and also pleaded contributory

negligence on the part of the decedent, in that he took no proper care or precaution to control his team or to prevent the same from running away, and took no proper care to hold himself on the seat, but carelessly lost control of the team and dropped or fell from the harvester.

It should be noted that the accident occurred after the passage of the Roseberry Act, which contained the following provision as to contributory negligence:

> "Section 1. In any action to recover damages for a personal injury sustained within this state by an employee while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee." (Stats. of Cal. 1911, p. 796.)

The case was first tried before Judge Farrington, sitting with a jury, and resulted in a verdict in favor of plaintiff (Rec. pp. 34-5), which was set aside by Judge Farrington on the ground that no negligence whatever was proved, and Twining's horse having run away while he was in the cart holding the lines, there could be no presumption of negligence. A copy of his opinion is attached as an appendix hereto.

The case was again tried before Judge Trippet, and a jury, and resulted in a like verdict in favor of plaintiff, from which this writ of error is prosecuted.

On the conclusion of plaintiff's case, the defendant moved for a nonsuit (Rec. pp. 85-86), which was denied, and at the conclusion of the case defendant moved for an instructed verdict in favor of defendant, which was likewise denied (Rec. p. 114). During the trial, the court permitted evidence to be given as to certain alleged negligent conduct of Twining, occurring four days before the occasion of the death of the decedent, submitted the case to the jury under the law of negligence and an instruction regarding the liability for using a vicious animal (Instruction No. 4, p. 123), and the common-law instruction as to contributory negligence (Instruction No. 8, pp. 123-4), refused all of the requested instructions by defendant as to the effect of contributory negligence under the Roseberry Act (Instructions 5, 6, 7, 8, 9, 10 and 11, Rec. pp. 126-8), and as to the proper measure of damages (Instructions No. 12, p. 128).

Questions Presented and Assignment of Errors.

The principal contentions to be presented to this court are as follows:

1. That no evidence whatever was introduced showing that the defendant was negligent in any way, or that the horse was vicious, or known to be vicious, or that a safe place was not provided for the decedent, or that Twining was negligent in the handling of the horse.

2. That plaintiff made no case for the reason that he was not proved to be the duly appointed, qualified and acting administrator of the estate of the decedent, for the reason that the order appointing him required him to file a bond, as required by law (Rec., p. 78), and the bond given by him (Rec., p. 81) was not the bond required by law, and was void on its face.

3. That plaintiff was not entitled to recover for the reason that there was no evidence introduced showing that the person who was killed was the husband of the alleged widow, Giuditta di Giovanni Petrocelli Spina, or the father of the alleged child, Assunta Spina, in this that the action was originally brought by the administrator of Peter Spino and later the administrator of the estate of Pietro Spina, sometimes known as Peter Spino, was substituted, but no evidence was introduced that the man who died was the same person as the Pietro Spina who was married in Italy thirteen years before, or that the witness Giuditta Petrocelli was the same person as the alleged widow Giuditta di Giovanni Petrocelli Spina. The only testimony in the record is that on page 85, and it in no way connects the two men.

4. That the record fails to show that the district court had any jurisdiction of the case made by the amended complaint, and for that reason the judgment should be reversed.

5. That the court erred in permitting evidence to be introduced as to an alleged act of negligence of Twining on an entirely different occasion.

6. That the court erred in submitting to the jury the law as to the liability of keeping a vicious animal when there is no evidence that the animal was vicious.

7. That the court erred in refusing to instruct the jury as to the effect of contributory negligence as laid down by the Roseberry Act, and in giving the common law instruction on that subject.

8. That the court erred in refusing the requested instruction as to the measure of damages.

9. The court erred in refusing the requested instruction as to the necessity of plaintiff showing whether he was under the Roseberry Compensation Law, and for the same reason plaintiff failed to prove a case.

The following are the formal assignment of errors contained in the record (pp. 139-156) on which appellant relies:

"I.

That during the trial of said action, Morrison Knight was called as a witness on behalf of the plaintiff and was asked the following question:

'Mr. DUNNE. Q. On the 27th of June. that first occasion when he came out, three days before Spina's death, what did Twining do on that occasion? On that day what did Twining do?

A. He came out to the machine. He was driving a brown horse. He got out of the cart and got in, and got in where the sack-sewer was, and I was on top of the machine, and I looked up and saw his cart going around the team, and the mules started to run and I grabbed the brake and stopped them.' (Rec. p. 39.)

The defendant objected to this question and answer, as being entirely immaterial to any issue in the case, which objection was overruled and the

defendant then and there excepted thereto. That the court erred in allowing said witness to answer said question, and in overruling the objection.

II.

The following question was then propounded to the said witness:

'Q. And when he got out of the cart on that occasion, then did he tie up his horse anywhere, or allow the horse to wander about?

A. Let his horse go.

Q. Let the horse go? As I understand your testimony, that horse got up near the mule team?

A. Went up alongside the mules.

Q. And then they started to run, when you got to the brake and stopped them?

A. Yes, sir.' (Rec. p. 40.)

The defendant objected to these questions and answers as being entirely immaterial to any issue in the case, and having no possible relation with anything that took place on the first day of July, when the injury occurred. That the court erred in allowing said witness to answer said question and in overruling defendant's objection thereto.

III.

The witness was then asked this further question:

'Q. Now, when that transaction occurred, did you say anything to Twining? A. I did.

Q. You may state now what you said to Twining at that time?

A. When I stopped the team, I got up on the machine where he could see me, and I says: You take care of that horse or stay out of the field. That is all I remember—yes, I remember something more.

Q. Do you recollect anything else you said to him?

A. Yes, I do; that he might cause a runaway and kill somebody, or some of the mules tear up the machine.' (Rec. p. 40.)

Defendant objected to this question and answer, as being entirely immaterial to any issue in the case, which objection was overruled, and the defendant then and there excepted thereto, which ruling the defendant now assigns as error on the part of the trial court.

IV.

The following question was then put to the said witness:

'Q. Now, when you said that to Twining, did he make any reply to you?

A. I never heard anything.

Q. What did he do, if anything?

A. He got in his cart and drove off.' (Rec. p. 40.)

Defendant objected to these questions and answers as being entirely immaterial to any issue in the case, which objection was overruled and the defendant then and there excepted thereto, which ruling the defendant now assigns as error on the part of the trial court.

VI.

Plaintiff then offered in evidence the probate record in the matter of the estate of Peter Spino, deceased, in the following words:

'Mr. Dunne. If your Honor please, it is alleged in the complaint and denied in the answer, on information and belief, or lack of information and belief, that by proper proceedings had in the Superior Court of the State of California, in and for the County of Merced, the present plaintiff was duly appointed the administrator of the estate of the deceased. For the purpose of supporting that allegation in the complaint, I offer in evidence the probate record in that matter, numbered 892, in the matter of the estate of Peter Spino, deceased, filed July 16, 1912; and I understand from my friends on the other side that there is no question about the authenticity of these papers.

The Court. They may be considered exhibit—whatever it is.

And may they be regarded as read?

Mr. Treadwell. Yes.' (Rec. p. 55.)

The defendant objected to the offering of these probate papers in evidence on the ground that the probate proceedings were in the name of the estate of Peter Spino, *deceased;* whereas the name of the decedent in this case was Pietro Spina. This objection was overruled, and the defendant then and there excepted thereto, which ruling the defendant now assigns as error on the part of the trial court.

VII.

The following question was propounded to the witness Knight.

'Q. Now you observed that horse as he was driving it on that occasion, and I will ask you what manner of horse that was in your opinion. State your opinion as to the character of that horse.

A. Well, in my opinion it was a high-life small horse.' (Rec. p. 41.)

Defendant objected to this question as being incompetent, irrelevant and immaterial, calling for the conclusion of the witness, and no foundation laid for it, which objection was overruled, and the defendant then and there excepted thereto. That the court erred in allowing said witness to answer said question and in overruling the objection.

VIII.

Said witness was then asked this further question:

'Q. Would you say that a horse of that kind—could you describe a horse of that kind as a spirited animal?

A. My opinion, yes.' (Rec. p. 41.)

Defendant objected to this question as being incompetent, irrelevant and immaterial, calling for the conclusion of the witness, and no foundation laid for it, which objection was overruled, and the defendant then and there excepted thereto. That the court erred in allowing said witness to answer said question and in overruling the objection.

IX.

The following question was propounded to the witness Salapi:

'Q. I wish you would describe what kind of an animal in your opinion this horse was?

A. The horse in my opinion was full of life.' (Rec. pp. 49-50.)

Defendant objected to this question as being incompetent, irrelevant and immaterial, calling for the conclusion of the witness, and no foundation laid for it, which objection was overruled, and the defendant then and there excepted thereto. That the court erred in allowing said witness to answer said question and in overruling the objection.

X.

The court then instructed the jury as follows:

'I instruct you that if the owner of an animal not naturally vicious, but which in fact is vicious, knows its vicious propensities or disposition, he is liable for an injury inflicted by it upon the person of one who is free from fault. But, in this connection, I further charge you that the knowledge of a servant to whom an animal is entrusted, of its disposition or propensities, is the knowledge of the master sufficient in law to render the latter liable, and I further instruct you that if, while in charge of the animal, the servant acquires knowledge of its disposition or propensities, then the circumstance that this knowledge was acquired after the animal was taken in charge and was not known either to the servant or to his employer at the time when the charge of the animal commenced, will not exonerate the employer from liability.' (Rec. p. 115.)

Defendant then and there excepted to the above instruction on the ground that there being no evidence that the horse in question was vicious, it was improper to submit that issue to the jury, and the giving of this instruction the defendant now assigns as error on the part of the trial court.

XI.

The court then charged the jury in part as follows:

'In order, therefore, to find a verdict for the plaintiff you must not only find from a preponderance of all the evidence that the defendant was negligent, but also that such negligence was the proximate cause of the injury to the plaintiff; and you must further find that the evidence fails to show by a preponderance thereof that the plaintiff was guilty of negligence however slight contributing proximately thereto; otherwise your verdict must be for the defendant.' (Rec. p. 118.)

The defendant then and there excepted to the above part of the court's instruction to the jury on the ground and for the reason that the same does not correctly state the law applicable to said case, in this: that it instructed the jury that if it found the plaintiff guilty of any contributory negligence, however slight, it must find a verdict for the defendant, and the defendant now assigns the giving of the above portion of the court's charge to the jury as error on the part of the trial court.

XII.

The defendant prior to the argument of the case to the jury seasonably requested the court to give the following instruction to the jury; but the court refused to give the said instruction or any part thereof:

'You are instructed that plaintiff failed to prove whether or not the decedent was under the provisions of the so-called Roseberry Compensation Law of this State, or whether or not the employer and employee in this case had elected to come under the provisions of that law, he has failed to establish a fact necessarily affecting his right to recover and he therefore cannot recover in this action.' (Rec. p. 124.)

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the

law applicable to the issues in said cause, and was not in any form given by the court to the jury, and such refusal the defendant now assigns as error on the part of the trial court.

XVI.

The defendant prior to the argument of the case to the jury, seasonably requested the court to give the following instruction to the jury, but the court refused to give the said instruction or any part thereof:

'If you find that the negligence of the decedent was of the same character or degree as the negligence of defendant, plaintiff cannot recover.' (Rec. p. 126.)

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the court to the jury, and such refusal the defendant now assigns as error on the part of the trial court.

XVII.

The defendant prior to the argument of the case to the jury, seasonably requested the court to give the following instruction to the jury, but the court refused to give the said instruction or any part thereof:

'If you find that the negligence of the decedent was equal to that of the defendant, plaintiff cannot recover.' (Rec. p. 126.)

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the court to the jury, and such refusal the defendant now assigns as error on the part of the trial court.

XVIII.

The defendant prior to the argument of the case to the jury, seasonably requested the court to give

the following instruction to the jury, but the court refused to give the said instruction or any part thereof:

'In this connection you are instructed that gross negligence is that lack of care which even a person of careless habits would observe in avoiding injury to his own person or a life under circumstances of equal or similar danger. It consists of a reckless disregard of danger.' (Rec. pp. 126-7.)

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the court to the jury, and such refusal the defendant now assigns as error on the part of the trial court.

XIX.

The defendant prior to the argument of the case to the jury, seasonably requested the court to give the following instruction to the jury, but the court refused to give the said instruction or any part thereof:

'In order to constitute gross negligence some degree of wilfullness is necessary. It involves recklessness, and an intent, actual or constructive, to act irrespective of the rights of others must be shown.' (Rec. p. 127.)

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the court to the jury, and such refusal the defendant now assigns as error on the part of the trial court.

XX.

The defendant prior to the argument of the case to the jury, seasonably requested the court to give the following instruction to the jury, but the court refused to give the said instruction or any part thereof:

'You are instructed that plaintiff has not charged defendant with gross negligence, so that defendant cannot be held responsible if decedent was guilty of contributory negligence.' (Rec. p. 127.)

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the court to the jury, and such refusal the defendant now assigns as error on the part of the trial court.

XXI.

The defendant prior to the argument of the case to the jury, seasonably requested the court to give the following instruction to the jury, but the court refused to give the said instruction or any part thereof:

'Unless decedent used ordinary care and diligence it cannot be said that his negligence was slight.' (Rec. p. 127.)

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the court to the jury, and such refusal the defendant now assigns as error on the part of the trial court.

XXII.

The defendant prior to the argument of the case to the jury, seasonably requested the court to give the following instruction to the jury, but the court refused to give the said instruction or any part thereof:

'The fact that defendant has pleaded that the negligence of decedent contributed to his death cannot be taken by you as an admission by defendant that it was in any way guilty of negligence nor can it be taken as any evidence of negligence by defendant.' (Rec. p. 128.)

To the refusal to give the above instruction the defendant then and there duly excepted on the

ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the court to the jury, and such refusal the defendant now assigns as error on the part of the trial court.

XXIII.

The defendant prior to the argument of the case to the jury, seasonably requested the court to give the following instruction to the jury, but the court refused to give the said instruction or any part thereof:

'Damages in a case of this kind cannot be made vindictive to punish the defendant, nor can they be based on the sorrow, grief or suffering which the death may cause the family of the decedent. Damages must be limited to the pecuniary loss, if any, to the heirs by the death. You are not permitted to measure the loss except so far as it was a pecuniary loss.' (Rec. p. 127.)

To the refusal to give the above instruction the defendant then and there duly excepted on the ground that the said instruction correctly states the law applicable to the issues in said cause, and was not in any form given by the court to the jury, and such refusal the defendant now assigns as error on the part of the trial court.

XXIV.

That the District Court of the United States, in and for the Southern District of California, erred in denying the motion of the defendant for nonsuit, to which ruling the defendant then and there excepted. (Rec. p. 85.)

XXV.

The said court erred in denying the motion of defendant to instruct the jury to render a verdict in favor of defendant and against plaintiff, to which ruling the defendant then and there excepted. (Rec. p. 114.)

XXVI.

That the evidence is insufficient to justify the verdict in said action and defendant now specifies the following particulars in which the evidence is insufficient to justify the verdict:

1. The evidence is insufficient to justify the finding that this action was brought upon behalf of the estate or the heirs of Pietro Spina.

2. The evidence is insufficient to show that the person alleged to have been killed on the first day of July, 1912, left any heirs, or that he left the wife and child referred to in the amended complaint herein.

3. The evidence is insufficient to justify the finding that the defendant came to his death by reason of any carelessness or negligence of the defendant, its agents, employees or servants.

4. The evidence is insufficient to justify the finding that the horse furnished by defendant to Twining was restive, fractious, vicious, frisky, not easily controlled, liable to run away or a dangerous animal with which to approach the harvester team mentioned in said complaint.

5. The evidence is insufficient to justify the finding that the defendant knew that said horse was restive, fractious, vicious, frisky, not easily controlled, liable to run away or a dangerous animal with which to approach said harvester team.

6. The evidence is insufficient to justify the finding that the defendant carelessly or negligently caused or permitted said Twining to approach the said harvester.

7. The evidence is insufficient to justify the finding that the said Twining did negligently or carelessly approach the said harvester.

8. The evidence is insufficient to justify the finding that the said Twining approached the said harvester or that defendant permitted him to approach said harvester without any effort to manage, restrain, control or quiet said horse.

9. The evidence is insufficient to justify the finding that the said Twining failed and neglected to take proper precautions in the care or driving of said horse to avoid the frightening of said harvester team.

10. The evidence is insufficient to justify the finding that by reason of any carelessness or negligence of defendant said horse frightened said harvester team, or caused the same to run away or to injure or kill the said Spina.

11. The evidence is insufficient to justify the finding that the defendant failed or neglected to take reasonable or proper precautions to protect decedent.

12. The evidence is insufficient to justify the finding that the defendant failed or neglected or carelessly or negligently or otherwise failed or neglected to provide proper, adequate or safe appliances or instrumentalities for the conduct of its operations.

13. The evidence is insufficient to justify the finding that the defendant carelessly or negligently or otherwise failed or neglected to supply decedent with a safe place to work.

14. The evidence is insufficient to justify the finding that the defendant carelessly or negligently or otherwise caused or permitted the said Twining to use a dangerous or frightening horse.

15. The evidence is insufficient to justify the finding that the defendant carelessly or negligently failed or neglected to provide Twining with a safe and gentle horse as would enable him to approach said harvester team without frightening it.

16. The evidence is insufficient to justify the finding that any negligence or carelessness of defendant caused the injury set forth in the complaint, or that the cause of action therein alleged is based thereon.

17. The evidence is insufficient to justify the finding that by reason of any carelessness or negligence of defendant plaintiff has been damaged in

the sum of five thousand (5,000) dollars, or any sum.

18. The evidence is insufficient to justify the finding that plaintiff prosecutes the action for or on behalf of the wife or minor daughter of said decedent."

Argument.

I.

THERE IS NO EVIDENCE SHOWING THAT THE HORSE DRIVEN BY TWINING WAS VICIOUS OR KNOWN TO BE VICIOUS, OR THAT THE DECEDENT WAS NOT PROVIDED WITH A SAFE PLACE TO WORK, OR THAT TWINING WAS IN ANY WAY NEGLIGENT IN THE HANDLING OR CONTROL OF THE HORSE.

(1) Defendant supplied decedent with a safe place to work.

So far as supplying the decedent with a safe place to work is concerned, it appears that he was working on a standard Holt harvester. The harvester is equipped with three (3) brakes, one handled by the foreman, one by the sack sewer, and one by the driver (Rec. p. 47). The driver is also supplied with lines to control the direction of the mules (Rec. pp. 47-8). This form of harvester is the form generally used throughout the valley and throughout the state in harvesting grain (Rec. p. 87). The driver's seat is situated over the wheel horses (Rec. p. 87), reached by a ladder and the driver is provided with a place to support his feet, and also provided with a brake and lines (Rec. p. 87). The team can be controlled with the lines (Rec. p. 88), and it is impossible for the team to run any great distance if the brakes are set (Rec. p. 89).

As the court ruled on the trial that the "inquiry on this subject is limited as to whether that is the usual and ordinary way of construction and operation of the machine" (Rec. p. 89), it is clear that nothing further need be said on this subject, as the place where he was given to work was the ordinary, usual and customary place given to the driver of a harvester.

(2) There is no evidence that the Twining horse was vicious, or known to be such. On the contrary, the evidence shows it was not vicious.

D. W. Wallis, superintendent of defendant, testified that he was familiar with the horse in question; that it was six or seven years old; that it had been on the ranches two or three years, and the painters had been using it. He had never heard of its being vicious, and knew that the horse was driven by the painters, and then was driven by the boy to the machines, and was afterwards driven by Mr. Miller, the foreman; that he never knew of the horse being vicious, fractious, or liable to run away, or anything of that kind. The horse had "good life", but would stand around without being hitched or tied up (Rec. p. 88).

The witness *C. K. Safford,* foreman of defendant, testified that he had known the horse for seven or eight years, and that it had been in the use of the company during all of that time. He had it himself at the Henderson place, and it was also around the Canal Farm at Los Banos. The irrigators used it on the Henderson place in a cart. It was a small mare; did

not weigh over eight hundred and fifty pounds; generally used single, but worked both single and double. They used to let it stand around without hitching. He never knew of its being vicious or unmanageable, or anything of that kind (Rec. pp. 92-3).

B. M. McSwain testified that he was the painter who used the horse, and had known it about six months before the accident. He had it attached to the cart and drove it from place to place; that it was "high life" to start out with, but after you drove it he could get out and let it stand any place; he could get right out and throw the lines down, or over the back of the seat, and it would not run away. He never knew anything vicious or unmanageable about the horse. By "high life" he meant a horse that would be right up and coming when you slapped her with the lines and would move along in good shape. She would start in good and fast if you wanted her to. She was a light horse and he drove her over county roads and passed automobiles. She shied a little at first when taken right out of the field, but it did not amount to anything, and after a while she took to the automobiles all right (Rec. pp. 96-7).

The witness *Knight* never had seen the horse prior to the day in question (Rec. p. 46). He testified that in his opinion it was a "high life" small horse and a spirited animal (Rec. p. 41).

The witness *Salapi* testified that the horse was in his opinion full of life (Rec. p. 50). He never saw the horse prior to the day in question.

It is very clear from this that the horse was in every way an ordinary driving mare, and in no way had the characteristics of a vicious horse, within the meaning of the rule that makes an owner absolutely liable for any injury done by such an animal, unless it be the contention of appellee that a "live" horse as distinguished from a "dead" horse is of that character.

(3) There is no evidence that Twining was negligent in the handling or control of the horse.

At the time of the accident the harvester was driven by Spino and was under the control of one Knight, the sack-tender Albano was on the left side of the machine, and the header-tender Salapi was on the right side of the machine. Besides these men, there was a man on the machine named Trainor, who subsequently died before the trial. Albano testified at the first trial but died before the second trial, and his testimony on the first trial was read in evidence at the second trial. The four witnesses, therefore, to the occurrence were Albano, Salapi and Knight, called by plaintiff, and Twining, called by the defendant.

Before taking up the testimony of these witnesses in detail, it may be said that the evidence showed that Twining drove in the cart from the rear along the left-hand side of the harvester for the purpose of getting a report as to the number of sacks. He walked his horse alongside of the harvester and Trainor got off of the harvester and went toward the cart, but before he got there the horse attached to the cart ran away, passing the harvester and along side of the mule team, the mule

team then ran and as the machine went over a check, the decedent was killed. Twining was in the cart all the time, so there was no presumption of negligence, and the only question is as to whether there was any evidence of negligence (*Rowe v. Such,* 134 Cal. 573). For the purpose of showing that there not only was no evidence of negligence, but on the contrary a clear showing that Twining did everything possible to control the horse, we now proceed to state the evidence of each of the witnesses.

The witness *Albano,* who was on the same side of the machine as Twining in the cart, testified as follows:

> "I seen that boy in the cart when he first came up to the harvester. He came up to get the number of sacks. Mr. Trainor got off the harvester and went out to the cart to give him the number of sacks. Mr. Trainor was not at the cart when the horse that was on the cart began to run away. He was on the ground quite a ways off from the cart. He went up to the cart after he got off of the harvester. *The boy was in the cart all the time.* I did not notice when the horse and cart first began to run,—not when they started. After the horse started to run the mule team started to run away also.
>
> * * * * * * *
>
> When I first saw the boy with the horse and cart he was pretty close to the machine. I was sack-tender and was on the left side. The horse and cart was also on the left side of the harvester going the same direction as the harvester. At that time it was running pretty fast. The boy in the cart was counting the sacks. At the time when the horse and cart were going pretty fast the boy was holding the horse.
>
> Q. *Show us how he was holding the horse, how were his arms, describe his arms?*

A. *He was holding the horse pretty strong.*

Q. *Show us what position his arms were in at that time?* A. (*Witness illustrates.*)

Mr. Dunne. *I would like the reporter's notes to show that the witness extended his arms full length.*" (Rec. pp. 36 and 37.)

It will be seen from this testimony that the witness saw the horse while it was still "pretty close to the machine" and "on the left side of the harvester", and at that time the driver had hold of the lines holding the horse, and with his arms extended full length. This shows conclusively that while he was in the cart driving the horse at a walk alongside of the harvester, as testified to by other witnesses, he had such control of the lines that when the horse started to run, *and before it got past the machine* he was holding the horse pretty strong, with his arms extended their full length.

The witness *Knight* testified as follows:

"I saw Mr. Twining after he arrived at the harvester in the cart. He was probably twenty feet off from the harvester. He came in right to the back of the machine and made a couple of circles, and pulled up alongside. He came in, not to the back of the machine; he came from the south to the back of the machine. The machine was going west. He came in on a sort of angle, made a couple of circles, close to the back of the machine and went in alongside. The harvester was moving at that time. The mules were going at a slow walk. *When he came alongside there at the place where I saw him his horse was walking; his horse was walking the last I saw of him.* I first went to the brake when he was making those circles around the machine when he came up. I was at the brake by the time he got walking alongside of it. *I looked to see where he was and I saw him*

right alongside the machine, and I thought everything was all right. I thought there was no danger of any kind, and went back to the back of the machine and left the brake temporarily and thought it was perfectly safe to do so. * * * The cart is arranged to put the feet in the bottom of the cart on a slant in front of the driver. It is a form of cart that is very frequently used in that country. It is not customary to have what is generally called a dashboard on a cart.

When Mr. Twining approached I went to the brake. It is the usual thing I do when anybody approaches the harvester. There was nothing unusual in that at all. I saw Twining *after he quieted his horse down.* I was not able to see him all the time from the time he came over and got his horse quieted down until I afterwards saw the horse running away. There was a part of the time when I was on the opposite side of the machine, and therefore could not see Mr. Twining on the cart. In fact, that was the condition of things when his horse started to run. Mr. Twining's horse had run about midway of the team when I first saw it, when the team was running. His horse ran about two hundred yards before he got control of it. * * * At the time Twining's horse and cart got alongside the harvester, when the harvester was going west, and the horse walking, *Twining's horse was walking.* When the mule team was walking *and Twining's horse was walking* the distance between the harvester and the cart was probably twenty feet. *When he got alongside the harvester in the position and under the circumstances I have described, I thought everything was all right* and I saw a check and I went down to the brake. When I got down to the brake at that time, I could not see Twining or Trainor, my view was obstructed by the cleaner." (Rec. pp. 42-47.)

It is clear, therefore, from the testimony of this witness that after Twining drove his cart up along-

side of the harvester, he was walking his horse in an ordinary and proper manner; that the witness "thought everything was all right" and "thought there was no danger of any kind." It will be noted that this witness did not see the Twining horse at the exact moment it started to run, neither did Albano (Rec. p. 37).

The testimony of the third witness, *Salapi,* at both trials is in the record and we will therefore first present his testimony at the first trial. On the first trial he testified as follows:

> "Q. Now, tell us plainly and clearly all that you saw of that matter.
>
> A. I see—What I see, I see the cart coming pretty fast and we was there close to a big, high levee. Well, when this cart was going by, the mules started to run.
>
> * * * * * * *
>
> Q. Now, when you *first* saw this horse and cart where was it with reference to the harvester?
>
> A. Well, five or six steps from the harvester.
>
> Q. In what direction was it going at that time?
>
> A. It was going the same direction of the harvester team.
>
> Q. At what rate of speed, as nearly as you can describe it?
>
> A. It was going pretty fast, but I can't tell how fast it was going.
>
> Q. *Did you notice the boy that was driving the horse and cart at that time?* A. *Yes, sir.*
>
> Q. *What was his position in the cart at that time?*
>
> A. *He was holding the horse all he could, but it run away.*
>
> Q. And when you *first* saw this horse and cart, state whether it was abreast of the harvester or abreast of the mule team. Just at the point of time when you *first* saw the horse and cart was it

abreast of the harvester or abreast of the mule team —perhaps a simple word would be alongside—alongside the harvester or alongside the mule team when you *first* saw them?

A. First when I saw it, it was near the harvester, and he passed by.'' (Rec. pp. 53-54.)

It will be noted from this testimony that this witness was on the right-hand side of the harvester, while the horse and cart was on the left, and when he first saw the horse and cart it had already started to run. It was only five or six steps from the harvester at the time, and at that time ''Twining was holding the horse all he could, but it ran away''. The witness gave no testimony at the first trial whatever as to noticing the horse and cart before it began to run away, or how Twining was holding the horse, or anything of that kind, at the time it started to run away. On the contrary, he testified that the first time he saw the horse it had already started to run. It will be noted that the witnesses Albano and Knight had already testified that they did not see the cart at the time the horse started to run. On the second trial the witness Salapi attempted to supply this missing link, and testified as follows:

''Shortly before Spina was killed I saw a boy in a cart come near the harvester. The boy was in a cart. It was a small cart. It had no brakes. It had two wheels. * * * When he got near the harvester he was about five or six steps away. At that time when the boy was there alongside the harvester and five or six steps from it *his horse was going slowly.* * * *

Q. When the horse was there alongside the harvester and was walking, as you have described it, how fast were the mules going at that time?

The mules were walking also; both the mules and the horse and cart were walking straight in the same direction. At that time while those things were so, I saw Mr. Trainor; he jumps off the harvester. He moves about two steps near the cart. I see the boy in the cart at that time. He was looking to Billy Trainor. I saw that he was talking. I could not hear the words that they said, because the harvester was making a noise. The lines from the boy's horse were lying on top, loose, on top of the single-trees. *He had the ends of the lines, the extreme ends, the tips, in his left hand.* He was making motions to Billy Trainor with his right hand. *His left hand that held the tips of the lines was laying on his left knee at the time he was making these motions to Trainor.* While that was so the horse ran at once directly to the team. When the horse reached the mules and got alongside of the mules the mules ran away, right straight ahead. The horse runs alongside the team about seventy feet and then turns to the left. The mule team ran on the right side as far as the ditch. They were stopped there. *When the boy's horse started to run I saw him get hold of the line with both hands and try to hold the horse.* * * *

Q. After Twining came up in the cart and his horse was walking alongside of the machine, how far did he walk along that way? How far did the horse and cart go along walking?

A. About 20 or 30 steps." (Rec. pp. 49-52.)

Taking this testimony at its face value and disregarding any conflict between it and his previous testimony, it clearly appears that Twining brought his horse to a walk alongside of the machine; that he remained in the cart and held the lines in his left hand, the left hand resting on his knee, which would be the natural way to hold the lines while he was waiting to receive the number of sacks from the man who was approaching

the cart, and immediately the horse started to run he took the lines in both hands and tried to hold the horse.

This is all of the testimony on this subject, except the testimony of *Twining* himself, which is not materially different. He testified as follows:

> "When I came up to the harvester on the left-hand side; the harvester goes along very slowly and my horse was walking. My horse was going just about the same as the harvester. When I came up to the machine I was driving the horse. I had the lines in my hand when I came up there. I drove up to the side of the harvester, and I had the lines in my hand, and I believe that I changed them to my left hand and held them with my one hand, and turned in my seat towards the harvester. The sack-sewer got out and started to give me the count, and just at that moment, I believe, the harvester went over a check sideways, and the wheel on the right side of the harvester was up on top of a check, while the wheel on my side was down over the check, making the harvester look as though it was going to tip over, and that is what scared my horse, and he started out from the harvester,
>
> * * * * * * *
>
> Q. Now, when your horse started to run and you had your lines held in your left hand, do you remember how tight or taut you had the lines at the time you were driving along, whether they were loose or taut, or what?
>
> A. I held them so that I had perfect control of the horse, at any moment.
>
> Mr. DUNNE. I move to strike that out as not responsive to the question.
>
> The COURT. That will be stricken out, and I wish you would talk a little louder.
>
> Mr. TREADWELL. Just tell the court about how you were holding them when the horse was walking alongside the harvester and you had them in one hand, that is, if you remember how you held them?

A. I don't remember.

Q. You don't remember how taut you were holding them?

A. I know that I had them tight enough to keep the horse under control.

The lines were regular buggy lines. I know that I had them under me, and they hung down the back about two feet. This is the same harness I used before, although the horse was different; ordinarily when I used the lines the lines were under me on the seat and hung down a couple of feet behind. When I was holding them in my hands I was sitting on the lines. When the horse started to run I grabbed the lines with both hands and tried to hold them, but on account of the checks I would bounce out of my seat and I would loosen them again, and he would get another start. I would bounce up from the seat. During all that time I had the lines in both hands. I never at any time lost control of the lines from the time the horse started to run and I took the lines from one hand to two. I kept them in two hands all the time that it was being bounced up over these checks.

The horse ran until I got him entirely under control, I should say a block, about 300 yards. * * * My horse was alongside the harvester. My horse ran and the mule team ran and later on when I returned to talking distance I was advised that Mr. Spina was unconscious. When I was alongside the harvester my horse was walking and the mule team was walking, too. The reins were in my left hand. I changed them to my left hand. At that time I was looking toward the machine and the sack-sewer was getting out of the harvester on the side I was on. He started to go toward me. I was looking toward the harvester. It was then that the horse ran. * * * I think what frightened my horse was the fact that the harvester was going over the ditch and it was tipped at an angle, and that was what frightened my horse." (Rec. pp. 101-106.)

It will be seen that this version of the matter is not materially different from the combined version of the other witnesses, and far from showing any negligence, it simply shows the ordinary conduct that any reasonable man would follow under like circumstances.

Under the law this conduct did not constitute negligence.

The horse having run away while the driver was in the cart, there is no presumption that this was due to negligence.

Rowe v. Such, 134 Cal. 573;

and the opinion of Judge Farrington in the case at bar filed July 13, 1914.

"It is well settled in cases such as this that the owner of an animal, not naturally vicious is not liable for an injury done by it, unless two propositions are established: 1. That the animal in fact was vicious; and, 2, that the owner knew it."

Clowdis v. Fresno Flume etc. Co., 118 Cal. 315;

Reed v. Southern Express Co., 95 Ga. 108; 51 A. S. R. 62;

Hollyburton v. Burke County Fair Assn., 119 N. C. 526; 38 L. R. A. 156;

Eddy v. Union R. Co., 25 R. I. 451; 105 A. S. R. 897.

Neither of these requisites appear in this case, but it affirmatively appears that the horse was gentle and none of the parties ever knew of its being otherwise.

There is no rule of law which compels a person driving a horse to keep it absolutely under control.

Caughlin v. Campbell-Fell Bakery Co., 39 Colo. 148; 121 A. S. R. 158; 8 L. R. A. (N. S.) 1501;

Fallon v. O'Brien, 12 R. I. 518; 34 A. R. 713;
Lynch v. Kineth, 36 Wash. 368; 104 A. S. R. 958.

A person is only required to exercise that degree of diligence and care which a man of ordinary prudence might be expected to exercise under the same circumstances..

Phillips v. Dewald, 79 Ga. 732; 11 A. S. R. 458;
Billes v. Kellner, 67 N. J. L. 255; 91 A. S. R. 429;
Kimble v. Stackpole, 60 Wash. 35; 35 L. R. A. (N. S.) 148.

It is not negligence to drive a horse which shows signs of being unruly.

Creamer v. McIlvain, 89 Md. 343; 73 A. S. R. 186.

Many courts have held that leaving a horse unhitched on a public street, but in the immediate presence of the driver, is not negligence.

Belles v. Kellner, 67 N. J. L. 255; 91 A. S. R. 429;
Hayman v. Hewitt, Peake's Add. Cas. 170;
Bennett v. Ford, 47 Ind. 264.

The last two cases are extreme in their facts and if courts have held that driving unruly horses and leaving horses unhitched on public streets, is not negligence, *a fortiori,* the mere running away of an ordinarily gentle horse, while the driver is in the cart holding the lines, is not negligence. The following cases, however, are directly applicable to the situation here:

Crocker v. Knickerbocker Ice Co., 92 N. Y. 652:

Action to recover for injuries sustained by plaintiff, who, while crossing a street, was run over by one of defendant's ice wagons, which was at the time being

driven by a boy, a son of one of the defendant's employes. The court said, in part:

> "The only proof of negligence was that the driver was driving the team on a 'lively trot'. It cannot be held as matter of law or fact that merely driving at the rate of speed stated, in the streets of a city, is negligent. Persons driving in the streets of a city are not limited to any particular rate of speed. They may drive slow or fast, but they must use proper care and prudence, so as not to cause injury to other persons lawfully upon the streets. There was no proof in this case or at least not sufficient proof for submission to the jury, that the team was driven carelessly, or that the driver was negligent."

O'Brien v. Miller, 60 Conn. 214; 25 Am. St. Rep. 320, 322:

A horse, attached to a cart, ran away while in charge of the driver, and notwithstanding his efforts to control it, ran over and injured a person in the street. Plaintiff sued the owner and was nonsuited. In sustaining the nonsuit the court said:

> "If, however, it is claimed only that the fact of the horse running away affords a presumption of fact that there was negligence on the part of the defendants, then, of course, it must be taken in connection with the other facts. There is the fact that the horse had previously been frightened when near the cars, and had become unmanageable. This fact is not of itself evidence of negligence, although it might call for increased care on the part of the driver. And then there is the fact proved that at the time of the collision the driver was exercising the highest care to prevent injury. This, so far from showing negligence, is positive evidence the other way. No other fact is found in the evidence. We think the nonsuit was properly granted, and that there is no error."

Nilan v. Gas Co., 1 N. Y. A. D., 234:

In an action brought to recover damages resulting from the death of plaintiff's intestate, it appeared that he was riding on a wagon and that as the leading horses came opposite a trench of defendant's they shied at earth thrown out by laborers in the trench; that the driver pulled them over again, when the end of the wagon slewed against the curb whereupon the deceased was thrown off. Held that the only possible ground of recovery must be based upon the fact that earth was thrown out of the trench while the team was passing, and that such act did not constitute negligence. The court said, in part:

> "It would be practically impossible to guard against the happening of every event which might chance to frighten a timid team. It seems unreasonable to require the exercise of exceptional care simply because it sometimes happens that a very trifling occurrence will occasionally induce a sensitive horse to shy. In my opinion the proof failed to make out any negligence on the part of the agents of the defendant leading to the injury to the plaintiff's intestate, and hence the complaint was properly dismissed."

Button v. Frink, 51 Conn. 342; 50 Am. Rep. 24:

In passing on an instruction the court held that the burden of proof which the plaintiff usually has, was not shifted where a horse ran away and colliding with plaintiff injured him, and it further held that no presumption of negligence could be drawn from the mere fact of the horse's running away. The court in its opinion said:

> "If a horse is running away with his driver, there is nothing in the fact itself which tends to

> show negligence in the driver, or which tends to show how the horse became unmanageable, any more than a house on fire tends to show the origin of the fire, whether accidental or otherwise, and it would seem that it could as well be inferred in such a case that the party residing in the house was guilty of negligence in causing its destruction, in the absence of explanatory evidence showing the contrary, as it can be inferred from the mere fact that a horse is running away that the driver is guilty of negligence in causing his running, in the absence of proof to the contrary. If such a doctrine should be established as the law, it is not easy to see to what extent it might not be carried."

Keck v. Sandford, 2 Misc. (N. Y.) 484:

Action to recover for personal injuries alleged to have been sustained by plaintiff by reason of defendant's driver running into the wagon of plaintiff. Judgment for plaintiff and defendant's motion for a nonsuit denied. On appeal the judgment was reversed, the court saying:

> "Even had the evidence been clear that defendant's wagon was being driven fast, that fact alone was not sufficient to support any finding of negligence on the part of the defendant, unless the wagon had been driven at an unlawful rate of speed, a rate of speed forbidden by law or ordinance, in which case there would be a presumption of negligence on the part of the driver."

Robinson v. Bletcher, 15 Upper Canada Q. B. 159.

Action for negligence brought by plaintiff because defendant's horses ran away on the road and ran into plaintiff's sleigh, injuring plaintiff. No evidence of negligence was introduced except one witness who testi-

fied that he thought if more care had been used in driving the accident would not have happened. Verdict for plaintiff and a new trial was granted on the ground that there was no negligence as a matter of law.

Brown v. Heather, 8 Upper Canada, L. J. (N. S.) 86:

The horse of the defendant being balky, the defendant struck it with a whip to start it, his servant boy being on it. The horse started off and knocked down and injured the plaintiff in a lane along which the horse ran. The boy tried to stop the horse and called to the plaintiff. The plaintiff was nonsuited. Held that the nonsuit was right.

The cases quoted from are very similar in their facts to the case at bar and show that, unless negligence is affirmatively proved, no negligence can be presumed from the mere fact that the horse ran away and caused damage, nor from the additional facts that the driver was young and that the horse was going "fast" or at a "lively trot". On the authority of the above cases and on the facts of this case there is no negligence as a matter of law or fact.

Collateral matters which may be relied on by defendant in error, but which in no way show negligence on the occasion in question:

There is certain evidence in the record on which the defendant in error may rely in support of its claim of negligence, but that evidence is entirely immaterial to the subject in hand, as it had nothing to do with the running away of the horse. (a) In the first place, certain evidence was introduced showing that four days

before the accident, Twining came to the harvester with a different horse and got out of the cart, leaving the horse unattended and it wandered around near the mule team and he was warned that this was not safe. Such evidence, of course, was not competent for the purpose of proving negligence, but at most only for the purpose of showing that knowledge was brought to Twining that it was unsafe to leave the horse unattended (*21 Am. & Eng. Ency. of Law,* pp. 518-519). As Twining did not leave the horse unattended on the day of the accident, this incident has no weight in showing any negligence which was the cause of the accident. The evidence is without dispute that it was in no way unsafe to approach the harvester with a horse and cart. The witness *Knight* testified on this subject as follows:

> "It is not unusual at all for a buggy or a cart to drive up along the harvester while it is in operation from behind; they keep out of sight of the mules. The noise that would be ordinarily made by driving a horse and cart in an ordinary way up to the side of or from the rear of the harvester, over the ground, would be pretty nearly, if not entirely, killed by the noise of the machine itself. It is not an extraordinary or unusual thing at all to drive a cart up alongside of the machine for the purpose of getting the count of sacks or for any other purpose. That is done, the foreman will come up or a boy getting sacks, as a general thing, wherever harvesting is being done." (Rec. p. 45.)

(b) In the same manner there was certain evidence that in coming across the field before approaching the harvester Twining zigzagged, coming be-

tween a run and a gallop, and circled his horse behind the harvester before driving up alongside of the harvester. As none of these things in any way frightened the mules, they should be entirely disregarded in determining the matter in hand. There was no law, reason or rule requiring the cart to make a straight line across the field or to walk across the field, because as the evidence here shows the noise of a horse going across the field before getting to the harvester would not be heard by the mules at all on account of the noise of the machine, and it is not claimed that this in any way frightened the mules, or in any way caused them to run. The field was a checked field, which would account for the zigzagging of the driver (Rec. pp. 100-101).

II.

PLAINTIFF MADE NO CASE FOR THE REASON THAT HE WAS NOT PROVED TO BE THE DULY APPOINTED, QUALIFIED AND ACTING ADMINISTRATOR OF THE ESTATE OF THE DECEDENT, FOR THE REASON THAT THE ORDER APPOINTING HIM REQUIRED HIM TO FILE A BOND, AS REQUIRED BY LAW (Rec. p. 78), AND THE BOND GIVEN BY HIM (Rec. p. 81) WAS NOT THE BOND REQUIRED BY LAW, AND WAS VOID ON ITS FACE.

In the order appointing the plaintiff administrator of the estate of Pietro Spina, deceased, the court required, as the law required, that a bond "as required by law" be filed by him before the issuance of letters (Rec. p. 78). Section 1388 of the Code of Civil Procedure reads as follows:

affect the validity of his appointment, nor of any act performed by him after giving the bond, especially where no official act was performed, or attempted to be performed, in the mean time."

Chief Justice Beatty, in his concurring opinion in *Dennis v. Bint,* 122 Cal. 39, 48, said:

"But a critical examination of these cases will show that in none of them was the proposition as here stated actually involved. In every instance there had not only been a failure to take out regular letters of administration, but also a failure to comply with one or more of the *essential* conditions expressly imposed by the order (or in the last case the law) authorizing the party to administer, that is to say, he had failed to take the oath or file the bond, or both."

Pryor v. Downey, 50 Cal. 388, 399:

"It was found by the District Court that Forster was never appointed administrator, but that a conditional order only was made to the effect that he should become administrator, on giving security by filing the bond required by law; and it is further found that he never filed such bond, or otherwise qualified as such administrator. The order for the appointment, the qualification of the appointee, and the issuing of letters to him, were all necessary proceedings to invest such appointee with the office of administrator. (Estate of Hamilton, 34 Cal. 464.) The letters of administration may indeed, when issued, be evidence of the regularity of the previous proceedings, but here no letters were ever issued, and it affirmatively appears that no bond was ever filed, nor oath taken. Forster, therefore, was not administrator of the estate, and both the pretended sale by him and the order purporting to authorize it made by the Probate Court—then a court of inferior and limited jurisdiction—were inoperative to transfer to the purchaser any right or estate in the land, legal or equitable."

O'Neal v. Tisdale, 12 Tex. 40:

This action involved the objection to the substitution of an administrator *de bonis non* in a suit for an administratrix. Objection sustained. The court said:

> "The order of the Probate Court, making the appointment, was coupled with a condition that had to be complied with, before he could be the legal administrator; and the condition was, that he should give bond and security as required by law. That he had done so was not proven."

M'Williams v. M'Williams, 4 Rawle 382:

> "The administration bond having been executed but by one surety, the grant of administration which was the foundation of the plaintiff's title to sue in the action again Clark is, ipso facto, void, by the positive and unequivocal declaration of the legislature."

Feltz v. Clark, 4 Humphreys 79 (Tenn.):

> "But although in the absence of a bond the court may have regarded the defendant as administrator de facto, surrounded by all the other circumstances indicated, still until bond actually given, we do not perceive how, under our statute, the court could regard the office of administrator as in strictness filled."

Bradley v. The Commonwealth, 31 Pa. St. 522:

> "It seems to us very clear that this is no administration bond: for the law requires two or more sureties, and there is only one; and the bond was drawn for two, and only one of them has signed it. In such a case, by the very terms of the law, the letters of administration are void, and the person acting under them became administratrix of her own wrong, which is inconsistent with the attribution of any validity of the bond. See 4 Rawle 382; 4 Watts 21."

III.

PLAINTIFF WAS NOT ENTITLED TO RECOVER, FOR THE REASON THAT THERE WAS NO EVIDENCE INTRODUCED SHOWING THAT THE PERSON WHO WAS KILLED WAS THE HUSBAND OF THE ALLEGED WIDOW, GIUDITTA DI GIOVANNI PETROCELLI SPINA, OR THE FATHER OF THE ALLEGED CHILD, ASSUNTA SPINA, IN THIS THAT THE ACTION WAS ORIGINALLY BROUGHT BY THE ADMINISTRATOR OF PETER SPINO AND LATER ADMINISTRATOR OF THE ESTATE OF PIETRO SPINA, SOMETIMES KNOWN AS PETER SPINO, WAS SUBSTITUTED, BUT NO EVIDENCE WAS INTRODUCED THAT THE MAN WHO DIED WAS THE SAME PERSON AS THE PIETRO SPINA WHO WAS MARRIED IN ITALY THIRTEEN YEARS BEFORE OR THAT THE WITNESS GIUDITTA PETROCELLI WAS THE SAME PERSON AS THE ALLEGED WIDOW GIUDITTA DI GIOVANNI PETROCELLI SPINA. THE ONLY TESTIMONY IN THE RECORD IS THAT ON PAGE 85, AND IT IN NO WAY CONNECTS THE TWO MEN.

This suit was originally brought by G. E. Nordgren, as administrator of the estate of Peter Spino (Rec. pp. 6-9), and all of the papers appointing him administrator were entitled in the estate of Peter Spino (Rec. pp. 56-61). The complaint alleged that his heirs were Jovetta Spino and Sunda Spino (Rec. p. 8). Thereafter, it appears that a proceeding was started in the Superior Court in the matter of the estate of Pietro Spina, sometimes known as Peter Spino (Rec. p. 62), and resulted in the revocation of letters in the proceeding in the matter of Peter Spino, and the appointment of an administrator in the matter of Pietro Spina, sometimes called Peter Spino. Thereupon an amended complaint was filed by the new administrator of the estate of Pietro Spina, sometimes known as Peter

Spino, and alleging that his heirs were Giuditta di Giovanni Petrocelli Spina and Assunta Spina, aged six years (Rec. p. 17). It is admitted by the pleadings that the man who died was named Pietro Spina, although he was sometimes known as Peter Spino. In order to recover, it was necessary to show that the decedent left heirs.

Webster v. Norwegian Mining Co., 137 Cal. 399.

But the only testimony on that subject is the testimony of a woman who says her name is Guiditta Petrocelli (Rec. p. 85). She says that she knew Peter Spino or Pietro Spina, but does not say which she knew, or which is the correct name, and that they were married thirteen year ago in Italy. He left Italy to come to the United States seven years ago and there is no evidence that he ever came to California or is the same party who is here known either as Pietro Spina or Peter Spino. The witness herself never came to the United States until after the date of the death of the party who was killed, and while she testified that she had one child named Assunta Spina she did not testify that it was the child of the decedent, nor that it was born in lawful wedlock. It might be an adopted child from all that appears. There is, therefore, absolutely no evidence in the record that the party who married Giuditta Petrocelli in Italy thirteen years ago was the same party who was killed, or the Peter Spino whose administrator brought this suit.

This matter is made still more uncertain by the fact that the original complaint was brought on behalf of

Jovetta Spino and *Sunda Spino,* heirs of Peter Spino (Rec. p. 8), whereas the amended complaint was on behalf of *Giuditta di Giovanni Petrocelli Spina* and *Assunta Spina,* heirs of Pietro Spino (Rec. p. 19). The alleged widow is *Giuditta di Giovanni Petrocelli Spina,* the witness is Guiditta Petrocelli, the alleged child was *six* years old in July, 1913 (Rec. p. 19) and the child of the witness *ten* years old in August, 1914 (Rec. p. 85). The name of the witness is not the same as the alleged widow, the age of her child is not the same as his alleged child; the names of the heirs of Peter Spino are not the same as the names of the heirs of Pietro Spina. Here not only the heirs are changed but the decedent is changed also. Again, if the real name of the deceased was Pietro Spina, administration in the name of Peter Spino was a nullity, the suit was improperly instituted by the administrator appointed in that estate, and could not therefore be given life by amendment. In view of the ease of finding persons who even honestly but erroneously believe themselves to be heirs of decedents, it would be folly to compel us to disprove the identity of the parties when no proof of identity was offered, and the dissimilarity of names raises the presumption of different parties rather than identity. The presumption that identity of person is presumed from identity of name can not apply in this case to assist plaintiff, for that presumption can only prevail where the names are identical in fact. Here they are not identical as shown by the following authorities:

For the presumption of identity of persons to arise from identity of names the names must be identical.

Bowman v. Little, 61 Atl. 223, 226 (Md.):

> "It is true, generally speaking, identity of names is prima facie evidence of identity of persons; but the names, of course, must be identical, and this involves the identity of the Christian names; the identity of the initials thereof being insufficient. 15 Am. & Eng. Ency. L. 918, 919, and cases cited in notes. As already indicated, George W. Bowman, as named in the certificate, is by no means identical with G. Walter Bowman, the deceased, and no inference can be drawn that these two designations point out the same individual."

Bedwell v. Ashton, 87 Ill. App. 272, 274:

> "There was no proof that Claes Lundine, who was made a defendant, was ever a stockholder. The name of Chas. Lundine appears as a stockholder, but *the two names are not idem sonans, and, in the absence of proof, we can not assume that they are the same person.*"

Clary v. O'Shea, (Minn.) 75 N. W. 115:

> "The defendants named in the summons in that action are 'John O.Shea and also all other persons or parties unknown', etc. * * *
>
> In the judgment and order for judgment the name is written 'John O Shea', which is in the same form except that the period is omitted after the 'O'. In our opinion it can not be presumed that 'John O'Shea, named in the patent, is the same person as 'John O.Shea', named in the summons and proof of service thereof in that action. *'O'Shea' and 'Shea' are not the same name.*

Pietro Spina and Peter Spino as a matter of law are not idem sonans.

William Becker v. German Mut. Fire Ins. Co., 68 Ill. 412:

Action on a premium note alleged to have been executed by William Becker. Note was signed by Wilhelm Becker. Court held this was not *idem sonans,* saying:

> "There is here a difference in the orthography and sound of the names. We can not hold them to be the same, unless it be so made to appear by averment and proof. There is here no such averment or proof, the only proof in that respect being that the signature to the note is in the German language. *We can not judicially know that Wilhelm in the German language is the same as William in English.*"

Cleveland, C. C. & St. L. Ry. Co. v. Pierce, 72 N. E. 604 (Ind. App.):

Held that one suing as administratrix of the estate of "Ferdinand N." A. can not maintain an action for the death of "Fernando W." A. The court said:

> "The names 'Ferdinand' and 'Fernando' do not sound the same, nor are they substantially identical in sound. Both words are common Christian names, and their pronounciation and sound are radically different. * * * In the case we are considering, the names 'Ferdinand' and 'Fernando', as they appear in the title of the cause and body of the complaint, can not be 'sounded alike', even by 'doing violence to the power of the letters in the variant orthography'. In 'Ferdinand' we have the vowel 'i', and no letter to correspond with it in sound in 'Fernando', while in the latter name we have the vowel 'o' and no corresponding letter in sound in the former. The only syllable in the two

names that has the same sound is the first 'Fer', while the other two are essentially and radically different."

Burford v. McCue, 53 Pa. St. 427:

"But it was argued, that the jury might infer that R. P. O'Neil stood for Rev. P. O'Neil. That the letter R. in the signature stood for 'Rev.' and was not an initial in the name. *But this could not be presumed, unless some habit of so using it had been shown* on part of 'Priest O'Neil' as he was called. The initials preceding a surname in a signature are always understood to be the initials of a name, and not the abbreviation of a title, unless proved to be the former and not the latter. *There was no proof at all of this.* As the case stood, therefore, *without proof of identity to submit to the jury as a question of fact,* we think the court erred in submitting the instrument to the jury at all."

See also *Moynahan v. People,* 3 Colo. 367, where Patrick Fitz Patrick and Patrick Fitzpatrick were held not to be *"idem sonans',* and *Moore v. Allen,* 26 Colo. 197, where Waltimore Arens and Waldimar Arens were held not to be *"idem sonans".*

The presumption of identity of persons from identity of names does not apply in the case of remote transactions.

Sitler v. Gehr, 105 Pa. St. 577:

"Mere identity of name must be accompanied with some circumstances of time or place before we can attach any value to it as affecting rights of property.

It is true there are some authorities which hold that identity of name is prima facie evidence of identity of person. So much was said by Justice Sharswood in McConeghy v. Kirk, 68 Pa. St. 203. That this is the ordinary rule may be conceded.

But it does not apply where the transaction is remote. The true rule is believed to be that laid down by Chief Justice Gibson in Sailor v. Hertzogg, 2 Pa. St. 182, where he said: 'Identity of name is ordinarily, but not always, prima facie evidence of personal identity. The authorities on the subject may be consulted in Sewell v. Evans, 4 Ad. & El. (N. S.) 626, from which Lord Denham and other judges of the Queen's Bench concluded that identity of name is something from which an inference may be drawn, unless the name were a very common one or the transaction remote; and the reason given for casting the onus on the party who denies, is that disproof can be readily had by calling the person whose identity is denied into court. The name in this instance is not a very common one; but after more than a quarter of a century there ought certainly to be some preliminary evidence, however small'. The soundness of this rule can not be successfully questioned. It would work great injustice if rights of property, after a great length of time, were allowed to depend upon mere identity of name. A prima facie case thus submitted to a jury might be extremely difficult, if not impossible, to disprove. I know of no case in which mere identity of name has been held sufficient after the great lapse of time which exists here."

See:

Sailor v. Hertzogg, 2 Pa. St. 182, quoted above.

Roden v. Ryde, 4 Q. B. 629:

Suit on notes. Question of identity was raised. Lord Denman, C. J., in applying presumption of identity said:

"But, where a person, in the course of the ordinary transactions of life, has signed his name to such an instrument as this, I do not think there is an instance in which evidence of identity has been required, except Jones v. Jones, 9 M. & W. 75.

There the name was proved to be very common in the country; and I do not say that evidence of this kind may not be rendered necessary by particular circumstances, as, for instance, length of time since the name was signed."

IV.

THE RECORD FAILS TO SHOW THAT THE DISTRICT COURT HAD ANY JURISDICTION OF THE CASE MADE BY THE AMENDED COMPLAINT, AND FOR THAT REASON THE JUDGMENT SHOULD BE REVERSED.

The original complaint showed no diversity of citizenship, but the petition for removal alleged that defendant was a citizen of Nevada and the plaintiff Nordgren was a citizen of California and Jovetta Spino and Sunda Spino were subjects of the Kingdom of Italy. On these allegations the case was removed. The amended complaint was filed by Saverio di Giovanni Petrocelli, and contains no allegation of his citizenship. Under section 1370 of the Code of Civil Procedure an administrator is required to be a bona fide *resident* of the state, but not a *citizen* thereof, and no grounds of qualification can be added by implication (*Estate of Bauquier,* 88 Cal. 302, 312, *Estate of Muersing,* 103 Cal. 585). When the citizenship of an administrator is necessary to show jurisdiction it must be alleged *(Coal Co. v. Blatchford,* 11 Wall. 172, 20 L. ed. 179). The amended complaint does allege that the heirs, Giuditta di Giovanni Petrocelli Spina and Assunta Spina, are *residents* of the Kingdom of Italy, but not that they are *citizens or subjects* thereof. An allegation of residence is insufficient *(Horne v. Hammond Co.,* 155 U. S. 393; 39 L. ed. 197; 15 Sup. Ct. Rep.

167; *Wolfe v. Insurance Co.,* 148 U. S. 389; 37 L. ed. 493; 13 Sup. Ct. Rep. 602; *Menard v. Goggan,* 121 U. S. 253; 30 L. ed. 914; 7 Sup. Ct. Rep. 873; *Everhart v. Huntsville College,* 120 U. S. 223; 30 L. ed. 623; 7 Sup. Ct. Rep. 555; *Grace v. Insurance Co.,* 109 U S. 278; 27 L. ed. 932; 5 Sup. Ct. Rep. 207; *Brown v. Keene,* 8 Pet. 112; 8 L. ed. 885; *Marks v. Marks,* 75 Fed. 321). The heirs are the real parties in interest, and the administrator a mere nominal party, and their citizenship is controlling in determining jurisdiction *(Stewart v. Baltimore & Ohio R. R. Co.,* 168 U. S. 449; 42 L. ed. 537; 18 Sup. Ct. Rep. 105; *Munro v. Dredging Co.,* 84 Cal. 515, 518; *Webster v. Norwegian Mining Co.,* 137 Cal. 399).

We recognize that where the court acquires jurisdiction, as it did in this case by the removal, it would not lose jurisdiction by the mere change of an administrator of a party whose citizenship was sufficient to confer jurisdiction although the new administrator was not a citizen of the same state. But here by the original removal the court acquired jurisdiction of a controversy in favor of Jovetta Spino and Sunda Spino as heirs of Peter Spino. The amended complaint seeks to confer jurisdiction in respect to a controversy in favor of Giuditta di Giovanni Petrocelli Spina and Assunta Spina as heirs of Pietro Spina. There is nothing certainly in the record showing that the people are the same and, therefore, there is an entire lack of showing of requisite diversity of citizenship to sustain the jurisdiction of that controversy. In case of a controversy with a new party to the suit brought in by amendment, the requisite diversity of citizenship of the new party must be alleged *(Course*

v. Stead, 4 Dall. 27; 1 L. ed. 724). This objection may be raised at any time without any plea *(Susquehanna etc. Co. v. Blatchford,* 11 Wall. 172; 20 L. ed. 179). The presumption is that the case is without the jurisdiction of the court and this presumption continues in this court *(Bors v. Preston,* 111 U. S. 255; 28 L. ed. 419; 4 Sup. Ct. Rep. 407; *King Bridge Co v. Otoe Co.,* 120 U. S. 226; 30 L. ed. 623; 7 Sup. Ct. Rep. 552; *Stuart v. Easton,* 156 U. S. 47; 39 L. ed. 341; 15 Sup. Ct. Rep. 268; *Mansfield etc. Ry. v. Swan,* 111 U. S. 383; 28 L. ed. 462; 4 Sup. Ct. Rep. 512; *Roberts v. Lewis,* 144 U. S. 658; 36 L. ed. 579; 12 Sup. Ct. 781; *Capron v. Van Noorden,* 2 Cranch. 126; 2 L. ed. 229; *Von Voight v. Michigan etc. Co.,* 130 Fed. 398). Citizenship must be alleged and it is not sufficient that it may be inferred argumentatively from the pleadings *(Brown v. Keene,* 8 Pet. 112; 8 L. ed. 885; *Robertson v. Cease,* 97 U. S. 646; 24 L. ed. 1057; *Continental Ins. Co. v. Rhoads,* 119 U. S. 240; 30 L. ed. 380; 7 Sup. Ct. Rep. 193).

We therefore submit that a new controversy in favor of people not named in the original complaint and respecting the estate of a person not named in the original complaint having been inaugurated by the filing of the amended complaint, it was necessary that the requisite diversity of citizenship be shown. The mere fact that this was done by consent can not alter the case, for consent can not confer jurisdiction where none is shown to in fact exist.

V.

THE COURT ERRED IN PERMITTING EVIDENCE TO BE INTRODUCED AS TO AN ALLEGED ACT OF NEGLIGENCE OF TWINING ON AN ENTIRELY DIFFERENT OCCASION.

As appears by assignment of errors one to five, the court permitted witnesses to testify to an occasion four days before the accident when Twining came to the harvester, and got out and left his horse unattended. It was not the same horse which he had on the day of the accident (Rec. p. 44), and the court also permitted the witnesses to testify as to what was said to him on that occasion. It is well settled that proof of other and distinct acts of negligence is not admissible for the purpose of proving negligence *(21 Am. & Eng. Ency. of Law*, pp. 518-519). This testimony is attempted to be justified for the purpose of showing that Twining knew that a horse unattended might scare the mule team, but we submit that until it was first shown that Twining on this occasion left the horse unattended it was not competent or material to show that he knew it was dangerous to do so. The evidence here shows that it was not dangerous to approach the mule team with a horse and cart in the regular manner (Rec. p. 45), and to prove that Twining knew that something was dangerous which he did not do on this occasion was entirely improper, and of course the prejudicial nature of such testimony can easily be appreciated by the court.

VI.

THE COURT ERRED IN SUBMITTING TO THE JURY THE LAW AS TO THE LIABILITY OF A KEEPER OF A VICIOUS ANIMAL WHEN THERE WAS NO EVIDENCE THAT THE ANIMAL WAS VICIOUS.

The court by instruction covered by assignment of error No. 10 submitted to the jury the law as to the liability of a person for injury inflicted by a vicious animal. In view of the fact that there was no evidence whatever of the vicious character of this animal or the knowledge of any one that it was vicious, this instruction was erroneous and extremely prejudicial.

Slaughter v. Fowler, 44 Cal. 195;
Sargent v. Linden Mining Co., 55 Cal. 204;
Kendricks Estate, 130 Cal. 360;
Fowler v. Smith, 2 Cal. 39;
Crawford v. Roberts, 50 Cal. 235;
Nofsinger v. Goldman, 122 Cal. 609;
Meyer v. Foster, 147 Cal. 166;
Budan's Estate, 156 Cal. 230.

VII.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS TO THE EFFECT OF CONTRIBUTORY NEGLIGENCE AS LAID DOWN BY THE ROSEBERRY ACT, AND IN GIVING THE COMMON-LAW INSTRUCTIONS ON THAT SUBJECT.

While we feel that there was strong evidence in the record of contributory negligence, we would not expect this court to hold as a matter of law that contributory negligence was proved, but for the purpose of showing

the importance of the error of the court in its instructions on this subject, we refer to the following evidence:

Albano testified that when Spina fell he had the lines tangled up about his foot (Rec. p. 37).

Knight testified that he did not know "whether he fell off or jumped off or how he got off" (Rec. p. 48).

Salapi testified that Spina left both of the lines on the seat when he fell (Rec. p. 52) and that they got tangled around his foot (Rec. p. 52).

Wallis testified that in case the team ran it is the duty of the driver to put on the brake and keep the team straight or circle them, if it is better to do so (Rec. p. 88). If a man falls from the seat he would take the lines with him (Rec. p. 89).

Safford testified that some drivers supply themselves with a strap and tie themselves in and these straps do not usually come with the harvester (Rec. p. 95). Spino did not do so in this case.

It therefore results that the inference might fairly be drawn that decedent took no precautions to secure himself in the seat and that when the team began to run he probably dropped the lines and jumped from the seat, instead of doing what was required of him. In fact there is respectable authority to the effect that in a case of this kind plaintiff must affirmatively show that the decedent was free from fault. *(Gay v. Winter,* 34 Cal. 153, 164.)

We asked the court to instruct the jury as to the law of contributory negligence as laid down in the Roseberry Act (Stats. 1911, p. 796), which, in effect, provides that

where the contributory negligence is slight and that of the employer is gross, contributory negligence shall not be a defense but shall be a ground for diminishing the damages in proportion to the amount of negligence attributable to the employee. In other cases, that is where the contributory negligence is not slight or the negligence of the employer is not gross, the common-law rule of liability apparently still prevailed under the Roseberry Act. But the court refused all of the instructions in this matter and instructed the jury absolutely that "contributory negligence was a complete defense, however slight, contributing proximately thereto". The instruction given was clearly erroneous and the instructions refused seem to have been in strict accord with the Roseberry Act, and the only question is as to whether or not the error was prejudicial. It might be argued that an instruction which relieved the defendant from liability when he should not have been relieved would not be injurious to him, but the court well knows the unpopularity of the plea of contributory negligence, and it was on account of the unpopularity and apparent injustice of throwing all of the burden on the employee when the injury was caused only partly through his fault, that the defense was modified by the Roseberry Act and has since been largely repealed by the Workmen's Compensation Law. Instead then of being permitted to go to the jury with a proposition that they should measure the degree of fault and fix the damages accordingly, we were sent to the jury with the instruction that if any contributory negligence existed they must find a verdict in favor

of the defendant. We, therefore, are unable to see how it can be said that giving the jury an instruction not only contrary to law, but contrary to public opinion and refusing an instruction in accordance with law, and in accordance with public opinion, can be said to be without prejudice.

In this same connection, we asked that the jury be instructed that the plea of contributory negligence can not be taken as an admission by the defendant that it was in any way guilty of negligence (see specification 22, Rec. p. 152).

The court refused this instruction under a misapprehension as to the meaning of the decisions in *Linforth v. San Francisco Gas & Electric Co.*, 156 Cal. 58, 66, and *Mulholland v. Western Gas Co.*, 21 Cal. App. 44, 52.

In the *Linforth* case, supra, it was held that it was proper to instruct a jury that the claim of contributory negligence "*presupposes* the existence of negligence on the part of defendant", but this is quite different from the contention that our instruction sought to negative, namely: that a plea of contributory negligence was an *admission* of negligence or *evidence* of negligence by the defendant, for in the *Linforth* case itself the court said:

> "Against this instruction it is urged that it would 'naturally lead a not over intelligent jury to infer that the defense of contributory negligence was tantamount to a confession of negligence by the party asserting the defense.' * * * If, as appellant seems to contend, the jury through ignorance did not understand them, the fault lies not with the law."

This matter is still more clearly pointed out in the *Mulholland* case, supra, in which the same instruction was given as in the *Linforth* case, and in the dissenting opinion by Beatty, C. J., referring to the instruction given in the *Linforth* case it is said:

> "It plainly tells the jury that a plea of contributory negligence of the plaintiff is an admission of culpable negligence on the part of the defendant. This is not the law. A defendant may deny that he was guilty of any negligence, and at the same time may consistently claim that even if the jury should find that he has been negligent, the plaintiff would not have sustained any injury if it had not been for his own negligence as a proximate cause."

We are therefore confronted with an instruction which the Supreme Court says might be misunderstood by the jury through ignorance and which the late Chief Justice understood as conveying the same impression which the court admitted the jury through ignorance might draw from it, and under those circumstances we were entitled to a clear, plain, distinct instruction to the effect that the plea of contributory negligence was not an *admission* of negligence or *evidence* of negligence on the part of the defendant.

VIII.

THE COURT ERRED IN REFUSING THE REQUESTED INSTRUCTION AS TO THE MEASURE OF DAMAGES.

The plaintiff requested the court to instruct the jury that damages in a case of this kind can not be made vindictive to punish the defendant, that they can not

be based on the sorrow, grief or suffering which the death may have caused, and that they must be limited to pecuniary loss to the heirs (Rec. p. 128). The only instruction given by the court on this subject is found in the record, pages 118-119. The court there instructed the jury that they might consider the pecuniary loss and that they must not consider the sorrow of the widow and child. The court did not instruct that the damages could not be made vindictive or that they were limited to the pecuniary loss, and that they could not consider grief or suffering. The instruction requested was correct and should have been given.

Munro v. Pacific Coast D. & E. Co., 84 Cal. 515.

IX.

THE COURT ERRED IN REFUSING THE REQUESTED INSTRUCTION AS TO THE NECESSITY OF PLAINTIFF SHOWING WHETHER HE WAS UNDER THE ROSEBERRY COMPENSATION LAW, AND FOR THE SAME REASON PLAINTIFF FAILED TO PROVE A CASE.

The defendant by instruction covered by assignment 12 (Rec. p. 124) asked the court to instruct the jury that it was necessary for the plaintiff to show whether or not the decedent was under the provisions of the so-called Roseberry Compensation Law. The court refused this instruction.

It will be noted that the Roseberry Compensation Act (Stats. 1911, p. 796) lays down the rule of liability for death of an employee in a case of this kind, provided the parties have elected to come under the act. The

right to recover damages for death being entirely statutory and there being two statutes on the subject, one fixing the liability where the employer has elected to come under the act, and one fixing the liability where no such election has taken place, it would seem clear that any one seeking to recover under either act must show whether or not such an election has been made. Obviously, if he sought to recover under the part of the act which provided the compensation in case election had been made, he would have to allege the election, and there seems to be, therefore, no reason why, if he claims under part of the act which fixes the compensation in case no election has been made, he should not likewise allege that no such election has been made. One provision of the law is just as general as the other, and neither is in form or substance an exception to the other. One lays down a law of liability where the election has been made; one lays down the law of liability where the election has not been made, and an election or non-election being, therefore, a requisite on which to determine the basis of recovery, it would seem clear that it should be alleged and proved.

We respectfully submit that the judgment should be reversed.

EDWARD F. TREADWELL,
Attorney for Plaintiff in Error.

(APPENDIX FOLLOWS.)

APPENDIX.

In the District Court of the United States, in and for the Southern District of California, Northern Division.

Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina (sometimes known as Peter Spino), deceased,
Plaintiff,

vs.

Miller & Lux Incorporated (a corporation),
Defendant.

Opinion on Order Granting New Trial.

Farrington, District Judge:

At the close of plaintiff's case, defendant's motion for nonsuit, and its motion for an instruction directing the jury to render a verdict in its favor, were denied. It then rested, and now urges that the evidence fails to show any negligence on its part, and asks a new trial.

Pietro Spina was an employee of defendant. At the time of the accident, which caused his death, he was driving a thirty-two mule team attached to a harvester, and actually engaged in harvesting grain on defendant's ranch in Merced County, California. Twining, a young man of eighteen years, also in defendant's employ, drove up in a little cart drawn by a single horse. His business was to ascertain and record the number of sacks of grain

put out from the machine. The mules, taking fright, started to run just as the harvester crossed over a levee, and turned to the right into the field of grain. This levee was used for irrigation purposes, and was about two feet in height. When the machine passed over the levee, Spina, who was perched on a high seat above the team, fell off, and was dragged a short distance by one of the lines which had become tangled about one of his feet. Probably the strain on this line was what caused the mules to turn into the grain. After running some two hundred yards the mules came to a ditch; there they turned to the left. The foreman, Mr. Knight, who up to this time had been trying, without effect, to check them with the brake, jumped off the machine, ran ahead of the mules, and stopped them. Altogether the team traversed about three hundred yards. Knight then went back and reached Spina just before his heart ceased beating.

Immediately prior to the accident the mules were moving toward the west; Twining was zigzagging through the field from the south; as he approached "he circled his horse around" and came up alongside the machine, going in the same direction as the mules. Knight, as was his custom when any one drove up, went back on the rear of the harvester, and took hold of the brake. At the brake his view was obstructed, so he could not tell whether the horse was brought to a stop or not. He did not see Twining again until after the mules had started to run; at that time the horse was running alongside the mules, and eight to ten feet away

from them. The horse ran about two hundred yards before he was again under control.

Salapi, the header tender, says the cart never stopped; that Trainor got off the harvester and went toward Twining to give him the number of sacks, but did not reach him because the horse had started to run away. Salapi also testified: "I see the cart coming pretty fast, " and we was there close to a big high levee; well, when " this cart was going by, the mules started to run." When Salapi first saw the horse and cart, it was abreast of, and five or six steps from the harvester, back of the team, going pretty fast, and Twining was "holding the horse all he could, but it ran away".

Three days before the accident, Twining was warned by Knight to exercise more care in managing his horse as he approached the harvester.

Six men were employed on the harvester; Knight, the foreman; Spina, the driver; Salapi, the header tender; Albano, the sack tender; Trainor and Twining. Trainor and Spina are dead. Twining, who should know precisely how and why the accident occurred, how the mules became alarmed, and why his horse was running so rapidly as it passed the machine and came abreast of the mules, has not been produced as a witness; his absence is not accounted for.

The allegations of negligence in the complaint are as follows:

"IV. * * * Said horse, so furnished as aforesaid by said defendant to said Twining, was then and there, to the knowledge of said defendant, a restive, fractious,

vicious, frisky animal, not easily controlled, liable to run away, and a dangerous animal with which to approach said harvester team because of its frightening said mules. That on said first day of July, 1912, said defendant carelessly and negligently caused and permitted said Twining, for the purpose of counting and recording said sacks, to approach, and said Twining did approach, said harvester team with said dangerous and frightening horse aforesaid then and there entrusted to him by said defendant as aforesaid, without any effort to manage, restrain, control or quiet said horse, and failed and neglected to take any precautions in the care and driving of said horse to avoid the frightening of said harvester team; that by reason of said carelessness and negligence of said defendant, said dangerous and frightening horse aforesaid, did then and there frighten said harvester team, which, as above alleged, said decedent was then and there driving, and caused said harvester team to run away, whereby said decedent was violently thrown and precipitated from the seat on which he was riding to the ground, and run over and killed by said harvester, which was then and there being propelled by said frightened team of mules."

"V. That the aforesaid death of said decedent was caused and brought about wholly by reason of the aforesaid carelessness and negligence of defendant; and in particular by the carelessness and negligence of defendant in failing and neglecting to take reasonable and proper precautions to protect said decedent; and in particular, by the carelessness and negligence of defendant in failing and neglecting to supply and provide proper,

adequate and safe appliances and instrumentalities for the conduct of its operations; and in particular, by the carelessness and negligence of defendant in failing and neglecting to provide said decedent with a safe place of work; and in particular, by the carelessness and negligence of defendant in causing and permitting said Twining to use said dangerous and frightening horse; and in particular, by the carelessness and negligence of defendant in failing and neglecting to provide said Twining with such a safe and gentle horse as would enable him to approach said harvester team without frightening it."

Save the fact that the horse ran away on this occasion there is no evidence that he was restive, fractious, vicious, frisky, not easily controlled, liable to run away, or a dangerous animal with which to approach said harvester team.

The circumstance that a horse runs away, standing by itself, is no evidence of bad character. The horse may have had the best of reasons for so doing. Furthermore, it is not shown that defendant knew, or by proper investigation could have known, of any vice in the horse. Whatever evidence we have, indicates that Twining endeavored to manage, restrain and control the horse. Salapi says he "was holding the horse all he could". In the absence of proof that he "failed and neglected to take any precautions in the " care and driving of said horse to avoid the frighten- " ing of said harvester team", we are not at liberty to presume any such carelessness. There is no evidence that defendant failed and neglected to supply proper,

adequate and safe appliances and instrumentalities for the conduct of its operations. No effort was made to point out any defect in the harvester, the cart, the brakes, the harness, or any appliance or to show that defendant knew of any such defect, or had failed to make reasonable examination and inspection by which such defect, if it existed, might have been discovered.

If the place provided for Spina to work was unusually or unreasonably dangerous, or if defendant had failed to take precautions which an ordinarily prudent man engaged in harvesting would have taken under the same conditions which prevailed when this accident happened, there is nothing in the record, except the accident itself, to show it.

There is no danger in driving up to a harvester team from behind, provided the horse is driven in the ordinary manner; the danger is in "driving up in a heedless way, or at a high rate of speed, an unusual rate of speed, from behind," or "in driving alongside or past them". "It is the unusual thing that frightens a team, not the usual thing that is taking place all the time." "Some sudden noise like a runaway, frightens them."

It is clear from the testimony that the horse and cart were moving rapidly as they passed abreast of the machine; the horse, in spite of Twining's efforts, went on beside the mules, and caused them to take fright and run away.

This leaves no basis for any presumption that Twining negligently caused or negligently permitted his horse to run by the mules. The negligence, if there

were any, occurred before or at the time he lost control of the horse, and as to what happened then, there is no testimony. Losing control of the horse may have been unavoidable. The mere fact Spina was killed while in defendant's employ is not sufficient to charge the latter with responsibility. Defendant must have been guilty of some negligent act or omission which directly and proximately caused the accident, otherwise it is not liable. The burden is on plaintiff to show the existence of such negligence. This burden is not shifted because the witness who knows all about the occurrence was in defendant's employ, and was not placed on the stand. If plaintiff had made out a prima facie case, the fact that defendant could have produced Twining, but failed to do so, would justify the inference that Twining's testimony would be unfavorable. Such an inference, however, is not sufficient to establish a prima facie case in the absence of evidence of negligence. Here the only evidence of negligence is the accident.

As a rule the doctrine of *res ipsa loquitur* is not applicable as between master and servant, unless the circumstances are such that the accident could not have occurred if the master had used reasonable care. When the attempt is made to apply the doctrine to the present case, how can it be said with any degree of certainty that if Twining had exercised reasonable care the horse could not have run away, or would not have become frightened, or could not have been stopped when he reached the machine, and prevented from passing the mules? Any one familiar with horses can name a dozen

agencies for which defendant was in no wise responsible, which might have suddenly alarmed the horse and caused him to run away.

In Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, the Court said:

"Where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

In Briedenbach v. M. McCormack Co., 128 Pac. 423, it was held that the owner of a runaway horse was liable for injuries inflicted on a stranger, where it appeared that the horse had been left in the street unfastened, without a driver, because it is negligent to so leave a horse.

To the same effect see:

Gorsuch v. Swan, 97 Am. St. Rep. 836;
Gammon v. Wilson, 5 Atl. 381;
Unger v. 42d Street Ferry, 51 N. Y. 497;
Pearl v. McCauley, 39 N. Y. Supp. 472.

In Roe v. Such, 134 Cal. 573, the cause of the runaway did not appear. The first seen of the driver he was in the air, falling from his seat to the ground. How he lost control of the horse was not shown. The court said it was as fair to presume that the cause of the runaway was unavoidable as that it was the fault

of the driver, consequently the trial judge properly took the case from the jury, and nonsuited the plaintiff.

In Coller v. Knox, 23 L. R. A. (N. S.) 171, plaintiff was the only witness; he testified that just before the accident he saw defendant's team standing in a lane near defendant's house and a man at the head of the horses; when the plaintiff had driven some two hundred feet further on, he heard a warning to look out, and immediately after was struck by the runaway team. The court said: "The mere fact of a runaway does not by itself imply negligence," and affirmed the judgment of nonsuit.

See:

Gray v. Tompkins, 15 N. Y. Supp. 953;
O'Brien v. Miller, 25 Am. St. Rep. 320.

In the last case the court quotes with approval the following from Button v. Frick, 50 Am. St. Rep. 24.

"If a horse is running away with his driver, there is nothing in the fact itself which tends to show negligence in the driver, or which tends to show how the horse became unmanageable, any more than a house on fire tends to show the origin of the fire, whether accidental or otherwise; and it would seem that it could as well be inferred in such a case that the party residing in the house was guilty of negligence in causing its destruction, in the absence of explanatory evidence showing the contrary, as it can be inferred from the mere fact that a horse is running away that the driver is guilty of negligence in causing his running, in the absence of proof to the contrary. If such a doctrine should be established

as the law, it is not easy to see to what extent it might not be carried."

A new trial will be awarded, and each party will have thirty days within which to take such steps as he may be advised.

(Endorsed): No. 42 Civil. In the District Court of the United States, in and for the Southern District of California, Northern Division. Saverio di Giovanni Petrocelli, as administrator of the estate of Pietro Spina, deceased, v. Miller & Lux, Incorporated (a corporation), Defendant. Opinion. Filed July 13, 1914. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk.